the case of *Watt* v. *Mortlock* [2] and the cases therein cited as authorities in favour of the proposition. To my mind, these cases strongly support the defendant's case. However, I do not think it profitable to go into the merits of this argument in view of the pending Civil Suit No. 1282 beyond noting that in the light of those decided cases the second defendant is entitled to go to court to compel the principal debtor to pay what is due from him provided that the debt is ascertained. I may as well cite a passage from the judgment of Wiles J. in *Bechervaise* v. *Lewis*: [3]

"A surety has a right, as against the creditor, when he has paid the debt, to have for reimbursement the benefit of all securities which the creditor holds against the principal. This alone would not help the defendant here, because he has not, nor has the principal, actually paid the creditor, and in our law set-off is not regarded as an extinction of the debt between the parties.

The surety, however, has another right, viz. that, as soon as his obligation to pay has become absolute, he has a right in equity to be exonerated by his principal.

Thus we have a creditor who is equally liable to the principal as the principal to him, and against whom the principal has a good defence in law and equity, and a surety who is entitled in equity to call upon the principal to exonerate him".

If I am right, this principle of law is now embodied in section 145 of the Indian Contract Act, 1872, which reads:

"In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully".

Section 98 of the Contracts (Malay States) Ordinance, 1950, is in substance the same as the Indian provision.

In the circumstances I set aside my order in chambers and substitute an order that the application for interim judgment against the second defendant be dismissed with costs.

Order accordingly.

Solicitors: *Lovelace & Hastings; Richard Talalla & Menon.*

LEE LEE ENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ismail Khan J.) February 7, 1966]

[Malacca — Criminal Appeal No 5 of 1965]

Gaming — Chee fah — Whether a public lottery — Whether punters' slips are lottery tickets — Expert evidence — Common Gaming Houses Ordinance, 1953, s. 9(1).

The appellant was convicted of buying 4 lottery tickets an offence under section 9(1) of the Common Gaming Houses Ordinance, 1953. The appellant was found in possession of four slips of paper which were stated by the expert to be staking slips or punters' slips.

Held: (1) *chee fah* is a lottery within the meaning of the Common Gaming Houses Ordinance, 1953;

(2) the slips of paper being punters' slips are not lottery tickets within the meaning of the Common Gaming Houses Ordinance, and therefore the conviction of the appellant in this case must be quashed.

Cases referred to:—

(1) *R.* v. *Ang Tian Seng* [1958] M.L.J. 21.

(2) *Ong Yap Chang* v. *Public Prosecutor* [1962] M.L.J. 46.

(3) *Teo Ng Choon & Ors.* v. *Public Prosecutor* [1955] M.L.J. 58.

CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for respondent.

Cur. Adv. Vult.

Ismail Khan J.: In this case the appellant was charged with assisting in carrying on a public lottery, to wit, *chee fah*, an offence under section 4(1)(c) of the Common Gaming Houses Ordinance, No. 26 of 1953.

On 24th May, 1964, at about 8 p.m., the appellant was in front of Kuala Sungei Bharu market. He was walking in the direction of Kuala Linggi when he was stopped by Inspector Ramalingam who disclosed his identity to him. He then searched the appellant under a street light. From the appellant's trouser pockets the inspector took out four slips of paper (P1 - P4). The expert witness who examined these slips of paper described them as staking slips in a *chee fah* game. He said that any person in possession of such slips was a collector. In cross-examination he conceded that they could be punters' slips.

At the close of the prosecution case the charge was amended to read as follows:—

"That you on 24.5.64 at about 8.15 p.m. at Pekan Kuala Sungei Bharu in the District of Alor Gajah did buy 4 lottery tickets — *chee fah* lottery — and thereby committed an offence under section 9(1) of Ordinance 26/53."

The appellant claimed trial on the amended charged. Neither the prosecuting officer nor defence counsel wanted any of the prosecution witnesses recalled. The appellant was then called for his defence but elected to say nothing. In the event the learned magistrate convicted him and sentenced him to pay a fine of $200. Against this conviction and sentence he has appealed.

Two points were taken in this appeal. It was first contended for the appellant, as the expert witness had conceded in evidence, that in *chee fah* the distribution of prizes depended upon the deliberate selection by the promoter of the number least staked on. The element of chance in the distribution of the prizes, the basic ingredient of the lottery, is lacking and that therefore the game of *chee fah* is not a lottery.

In this case, the expert witness merely referred to the book "Gambling Games of Malaya" by C. T. Dobree (p. 14) for a description of the *modus operandi* of the game of *chee fah*. Under the new sub-section (2) added to section 24 of the Common Gaming Houses Ordinance by the Common Gaming Houses (Amendment) Act, 1959, this book is an authority on the subject. Briefly the *modus operandi* is as follows. The game is based on 36 names, each name denoted by two characters. They are also denoted by the numbers 1 to 36. The promoter chooses one of the 36 names or its corresponding number and inscribes the name or number or both on a piece of paper. This is enclosed in a box which he seals or locks. This box should then be exhibited in a public place so that all the members of the public could see it. This is not readily feasible in this country. A little written chit or riddle to the chosen name or number is provided. Sometimes the riddle is disseminated by word of mouth. The promoter's agents then collect the bets from members of the public who need not rely on the riddle and may stake blindly. The punters sometimes give their bets to the agents on slips of paper known as punters' betting slips. After the time fixed by the promoter for the reception of all stake monies and agents' records, the promoter opens the sealed box in the presence of the public. As this is not usually feasible, the name or number is passed round by the agents by word of mouth. At page 12 the author says "the pay-out of such winning sums is dependent upon name(s) or number(s) obtained by deliberate selection or choice and not of chance". According to the author, the game of *chee fah* in its method of operation, organisation, preparation of riddles, collection of bets, declaration of winning numbers, etc. is similar to that of *chap ji ki*.

In the case of *Regina* v. *Ang Tian Seng*,[1] the expert in describing the *modus operandi* of the game of *chap ji ki* said that distribution of the prizes depended upon the deliberate selection by the promoter of the combination least backed. The magistrate therefore held that *chap ji ki* was not a lottery. The matter came before Tan Ah Tah J., by way of a case stated. In dealing with the point his Lordship said:—

> "It will have been seen from the evidence of the expert witness that after all the participants have hazarded their stakes, the promoter will as a rule select what the witness referred to as the 'least backed combination' and announce that it is the winning combination. It is also clear from the evidence of this witness that the majority of participants know that as a rule the least backed combination is the one that will be declared to be the winning combination. On this evidence the learned magistrate has stated that, in his view, the choice of the winning combination is made after due deliberation by the promoter and that therefore the distribution of the prizes is not determined by chance or lot. This is one of the reasons why he held that the transaction in question was not a lottery. Now it is clear that until the stakes have been hazarded by all the participants, not even the promoter will know which will be the least backed combination. In my opinion it is a pure matter of chance which combination will have the least number of stakers, as they are called, on any given day. It follows, therefore, that when the promoter purports to choose the least backed combination for the purpose of declaring it to be the winning combination, his choice is really dependent upon chance."

I respectfully adopt his Lordship's observations in that case. That disposes of the appellant's first objection.

It was again objected that there was no evidence that the exhibits P1 — P4 are staking slips and in the alternative that if they were, there is no evidence that they are lottery tickets within the meaning of the Ordinance and that section 9(2) of the Ordinance could therefore have no operation.

"Lottery ticket" is defined in section 2 of the Ordinance as follows:—

> "lottery ticket" includes any paper or figure or writing or symbol or other article whatsoever which either expressly or tacitly entitles or purports to entitle the holder or any other person to receive any money or money's worth on the happening of any event or contingency connected with any public lottery."

Section 9(2) reads as follows:—

> "A person in whose possession a lottery ticket is found shall be presumed until the contrary is proved to have bought the same."

As to exhibits P1 — P4, the evidence of the expert witness as recorded by the learned magistrate is as follows:—

> "Ex. P1 staking slip in *chee fah* — 22 stakes. Amount $6.70. No date.
> Ex. P2 staking slip in *chee fah* — 5 stakes. Amount 70 cts. No date.
> Ex. P3 staking slip in *chee fah* — 7 stakes. Amount $1.20. No date.
> Ex. P4 staking slip in *chee fah* — 3 stakes. Amount $2. Dated 25.5.64."

There is nothing to suggest what were the numbers chosen nor the amounts staked against the numbers. He said these slips were not records of stakes. When asked: "What is a record of stakes?", the answer was: "A record of stakes is a document showing percentage deducted". As to P1, he said anyone in possession thereof is a collector because six numbers had been betted twice. Here again, no explanation was offered as to what those numbers were and how they were "betted twice". He then said that P1 could also be a punter's slip. This evidence is therefore of no assistance in explaining these exhibits. The reasons given are certainly not so clear and unequivocal, to quote Adams J. in *Ong Yap Chang* v. *Public Prosecutor*,[2] to enable the magistrate to come to a decision. The learned magistrate in his judgment said he also relied on his experience in previous cases when he decided that the exhibits were staking slips. Apparently he was relying on the observation of Hill J. in *Teo Ng*

Choon & Ors. v. *Public Prosecutor*,[3] that a magistrate should not be denied the use and benefit of his own knowledge and experience. However, he did not say that he found the exhibits P1 — P4 identical to those used in his other cases. I think some help can be derived from *Dobree's* book. It would appear from page 15 of the book that in *chee fah* the agent's record would have the numbers 1 to 36 written horizontally across the top of the paper and the amount of each bet in column below each number. An agent's record of stakes would also contain the sum deducted by way of commission. If the agent has collected a small number of bets all the 36 numbers would not appear in the records but only those on which he has collected bets. Exhibits P1 — P4 appear to contain numbers written according to this pattern but without the sum allowed for the agent's commission. The exhibits also bear a strong resemblance to the specimens of betting slips shown at page 36 in the book. There are therefore ample grounds for holding that P1 — P4 are punters' slips.

The next point that calls for consideration is whether they are lottery tickets within the meaning of the Ordinance. In holding that they are such tickets the learned magistrate gave the following reasons:—

"Bearing in mind that Ex. P1 — P4 are stakes in *chee fah*, we have on page 16 of *Dobree's* book "Those punters who have staked on the announced name or number are subsequently paid by the agents their bets a gross amount of 30 times their original stakes."

It is true that those words appear in *Dobree's* book. No doubt punters will be paid if they have successfully staked. But there is nothing in *Dobree's* book to indicate that betting slips like P1 — P4 would entitle the holder thereof to money or money's worth in the *chee fah* lottery. They may well be records of bets the punter only intends to, but has not yet, placed with an agent. I am therefore not persuaded that P1 — P4 are lottery tickets and in the result the presumption under section 9(2) does not arise.

The appeal is allowed. The conviction is quashed and the sentence set aside. The fine if paid is to be refunded.

Appeal allowed.

Solicitors: *Joseph & Son.*

MOHAMED KUNJU v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Barakbah C.J. (Malaya) and Ong Hock Thye F.J.) February 8, 1966]

[K.L. — Federal Court Criminal Appeal No. X26 of 1965]

Penal Code s. 376 — Rape — Corroboration — Infection with venereal disease.

Criminal Law and Procedure — Preliminary inquiry — Committal on charge of attempted rape — Whether charge can be amended to one of rape at trial.

Evidence — Witness absent at trial — Deposition under s. 33 Evidence Ordinance, 1950.

In this case the appellant had been committed at the preliminary inquiry for attempted rape but at the trial he was found guilty of rape of a girl of about 11 years. The trial judge found that there was ample corroboration of the evidence of the girl that it was the appellant who had connection with her and had infected her with gonorrhoea. He was sentenced to ten years imprisonment.

Held: (1) there was corroboration of the evidence of the girl in this case both as regards the factum of connection with somebody and being infected by that person and as also as regards the identification of the appellant and therefore the appeal against conviction should be dismissed;

(2) in the circumstances as no violence was used and as the girl had not suffered physical damage that will impair her future chances of marriage, the sentence would be reduced to one of seven years's imprisonment.

Cases referred to:—

(1) *R.* v. *Rider* [1954] 1 All E.R. 5 at p. 6.

(2) *Kee Siak Kooi* v. *R.* [1955] M.L.J. 57, C.A.

FEDERAL COURT.

Dato' R. P. S. Rajasooria (*R. P. S. Rajasooria Jr.* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for respondent.

The grounds of judgment of the court below were as follows:

Raja Azlan Shah J.: Before me the accused was charged with the offence of rape under section 376 of the Penal Code. It was submitted by defence counsel as a preliminary issue that the prosecution could not proceed in the way they did on the ground that at the end of the preliminary enquiry the committing magistrate had committed the accused on a charge of attempted rape under sections 511 and 376 of the Penal Code. There is nothing novel in that argument. In answer to counsel's argument I think it would be sufficient if I quote a passage from the judgment of Streatfeild J. in *R.* v. *Rider*: [1]

"I have come to the conclusion that the proper construction to put on the word 'charge' is that a man is charged before a court which has jurisdiction to determine the matter in question..... But if justices commit a man for trial, they are not adjudicating on the case. The only thing they determine is whether there is a *prima facie* case to answer, and, if they think there is, they commit the accused. He is then brought before the court at assizes or quarter sessions on indictment, and it seems to me that then, for the first time, he is before a court having jurisdiction to determine the matter".

The charge against the accused was as follows:

"That you, on or about the 13th March, 1965, at about 10.30 p.m. at P.W.D. Barrack No. 242B Jalan Nibong, Dungun, in the District of Dungun, in the State of Trengganu, committed rape on Azizah binti Abdullah and thereby committed an offence punishable under section 376 of the Penal Code".